ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of	)	
	)	
Beehive Telephone Company, Inc.	)	CC Docket No. 97-237
Beehive Telephone, Inc. Nevada	)	
	)	
Tariff F.C.C. No. 1	)	Transmittal No. 6

To: The Commission

REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION

Beehive Telephone Company, Inc. and Beehive Telephone, Inc. Nevada (collectively "Beehive") hereby reply to the Opposition to Petition for Reconsideration ("Opposition") filed by AT&T Corp. ("AT&T") in the above-captioned proceeding.

I

AT&T wrongly suggests that the Commission has the discretion to conduct rate investigations "in any manner that it deems efficient". Opposition at 7. The Commission had to provide Beehive with the notice and hearing required by statute. *See* 5 U.S.C. § 553(c); 47 U.S.C. §§ 204(a), 205(a). When notice and hearing are required by statute, the provision of those basic procedural rights is not left to the Commission's "discretion". *RKO General, Inc.* v. *FCC*, 670 F.2d 215, 233 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 (1982). Ultimately, of course, the Commission's procedures "must be measured against the demands of due process". *Id.* at 232.

According to AT&T's unlimited discretion argument, the Common Carrier Bureau ("Bureau") could have given Beehive one day to file a direct case. Yet, no reasonable person would agree that a one-day filing period would satisfy Beehive's fundamental right to be heard "at a meaningful time and in a meaningful manner." *Mathews* v.

Eldridge, 424 U.S. 319, 333 (1976).

II

The Commission is under the obligation to state its directives clearly and to avoid drafting errors. *See McElroy Electronics Corp.* v. *FCC*, 990 F.2d 1351, 1366 (D.C. Cir. 1993). The Bureau failed to meet that obligation when it gave December 12, 1997 as Beehive's direct case deadline and then expressly ordered Beehive to file its case within 15 days (by December 18, 1997). *See Beehive Telephone Co., Inc.*, DA 97-2537, at 1, 15 (Com. Car. Bur. Dec. 2, 1997) ("*Designation Order*"). Nevertheless, AT&T supports the Bureau's finding that Beehive was "unreasonable" to assume that its deadline was exactly as the Bureau ordered. Opposition at 7 n.8.

The Bureau did not explain why Beehive acted unreasonably, beyond noting that December 12, 1997 was given as the deadline on page one of the *Designation Order*. *See Beehive Telephone Co., Inc.*, DA 97-2597, at 2 (Compet. Pricing Div. Dec. 12, 1997). [1/] However, the fact that a date was given on the first page of the order does not guarantee its correctness. A December 2, 1997 release date was also on page one, and that was incorrect. In any event, if it was patently unreasonable for Beehive to rely on the filing schedule set out at page five and the first ordering clause, why did the Bureau

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1/ Beehive did not have to "present evidence" that it had relied on the ordering clauses of the *Designation Order*. *See* Opposition at 7 n.8. Beehive made that representation in papers certified by counsel under 47 C.F.R. § 1.52. *See* Petition for Reconsideration at 4-5 (Feb. 5, 1998); Motion for Extension of Time at 3 (Dec. 9, 1997). No more was needed.

find it necessary to issue its December 8, 1997 erratum to formally correct its errors?

An order cannot be construed "to mean what an agency intended but did not adequately express." *McElroy*, 990 F.2d at 1366. It seems the Bureau erred by construing its defective order to be so clear as to make Beehive's reading of it unreasonable.

III

AT&T confuses the issue when it challenges Beehive's claim that it had no pre-prescription opportunity to comment on the Commission's use of an average ratio of total operating expenses ("TOE") to total plant in service ("TPIS"). AT&T claims that Beehive's argument on this point "fails" because the Commission has the authority to "rely on industry average costs in setting rates." Opposition at 9. However, that authority is irrelevant to the issue of Beehive's due process right to comment on the Commission's rate-setting methodology.

As far as one can tell, the Commission's use of a TOE to TPIS ratio in this case is *sui generis*. Because it is not prescient, Beehive had no prior opportunity to comment on the reasonableness of that methodology. AT&T simply cannot dispute that fact. 2/

2/ AT&T argues that reconsideration based on allegedly new facts is "only appropriate if such facts were unknown to petitioner at the time that it submitted its case." Opposition at 11 n.16. Reconsideration of new facts is also "appropriate . . . when the Commission determines that subsequent consideration is required to protect the public interest." *Creation of an Additional Private Radio Service*, 1 FCC Rcd 5, 6 (1986). *See* 47 C.F.R. § 1.106(c)(2). That is the case here.

IV

Citing *LECs' Rates, Terms and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport*, 12 FCC Rcd 18730, 18896 (1997) ("*Physical Collocation Tariffs*"), AT&T contends that the Commission has rejected the argument that LECs were "denied a full opportunity for hearing when the Commission used industry average data" to prescribe maximum loading factors. Opposition at 9 n.10. However, in that case, the Commission did not use "industry average data" to prescribe overhead costs. It upheld an interim prescription which was based on each LEC's ARMIS access cost data. 3/

In contrast to this case, the LECs were given a "full opportunity for hearing" in the *Physical Collocation Tariffs* proceeding. In October 1992, the Commission gave the LECs "clear and specific filing requirements" as to their overhead cost support. 4/ When those requirements were not met, the Bureau issued a designation order in July 1993 giving the LECs a second opportunity to provide their cost support. The LECs failed again, despite being given

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3/ *See Physical Collocation Tariffs*, 12 FCC Rcd at 18894-97 (affirming *LECs' Rates, Terms and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport*, 8 FCC Rcd at 8344 (1993) ("*Interim Overhead Order*")).

4/ *Physical Collocation Tariffs*, 12 FCC Rcd at 18895 (citing *Expanded Interconnection with Local Telephone Company Facilities*, 7 FCC Rcd 7369 (1992), *vacated in part and remanded, Bell Atlantic Telephone Companies* v. *FCC*, 24 F.3d 1441 (D.C. Cir. 1994)).

twenty-eight days to file direct cases. 5/ Having given the LECs two bites at the apple, the Commission prescribed rates in its November 1993 *Interim Overhead Order*.

The Commission recognized in its *Interim Overhead Order* that it "lacked sufficient information to make a permanent rate prescription." 8 FCC Rcd at 8360. It made the prescription subject to the completion of the tariff investigation and a "two-way adjustment mechanism". *Id.* at 8346. Unlike this case, the Commission did not rush to make a final prescription based on estimated costs.

In *Physical Collocation Tariffs*, the Commission used the "best surrogate data available" to prescribe interim rates *after* the LECs had been given an "ample opportunity" to justify their costs. 12 FCC Rcd at 18896. Moreover, by issuing an interim prescription order, the Commission opened the door for petitions for reconsideration, thereby giving the LECs yet another opportunity to meet their burden of proof. Beehive seeks the same ample opportunity here.

V

AT&T is incorrect when it claims that Beehive did not show that it "calculated its local switching rates on a lawful rate-of-return." Opposition at 10 n.13. Exhibit 1 hereto contains the revenue requirement calculations for Beehive's 1997 access tariff filing. Those calculations document the fact that Beehive based its rates on the prescribed 11.25% rate of return.

5/ The designation order was released on July 23, 1993. The direct cases were filed on August 20, 1993. *See Physical Collocation Tariffs*, 12 FCC Rcd at 18911.

The contention that Beehive used an unlawful rate of return ignores the "temporal dimension of rate-of-return regulation". *Virgin Islands Telephone Corp.* v. *FCC*, 989 F.2d 1231, 1239 (D.C. Cir. 1993). The fact that hindsight shows that Beehive earned an excessive return does not mean that Beehive acted unlawfully when it set its 1997 rates. *See id.*

When it authorized small telephone companies to set future access rates on past costs and demand, the Commission anticipated that the process could produce "inaccurate" rates, but that it would be "self-correcting and thus rate neutral over time because current actuals would be used in subsequent periods to set rates". *Regulation of Small Telephone Companies*, 2 FCC Rcd 3811, 3812 (1987). Clearly, that process worked in this case. Beehive's premium per minute access charge for one mile of transport dropped 80.65% (from $.30458 to $.05893) between July 1994 and July 1997.

VI

The Commission was not "required" to prescribe a premium switching rate based on so-called "industry average information". *See* Opposition at 10. Beehive agreed that the rate should be reduced 18.5% from $.04012 to $.032707 per minute. *See* Rebuttal to Opposition to Direct Case at 9, Ex. 1 (Dec. 29, 1997). It supported the $.032707 rate with nearly 400 pages of 1995/96 cost and demand data, which the Commission could have used to prescribe rates. 6/

6/ Beehive filed the backup data to its revised 1997 rates with its rebuttal case. *See* Letter of Russell D. Lukas to Magalie Roman Salas (Dec. 29, 1997).

While it has now jumped on the Commission's bandwagon, AT&T initially did not challenge the reasonableness of Beehive's costs. *See* Opposition to Direct Case of Beehive Telephone Company at 6-11 (Dec. 22, 1997). Ignoring the fact that it had Beehive's cost support since July 29, 1997 [7/], AT&T complained that Beehive failed to file any backup data with its direct case. *See id.* at 6. But it suggested that the Commission could use Beehive's "deficient data" to calculate a premium local switching rate. *See id.* at 9. Without employing industry average costs, AT&T used Beehive's data to arrive at a premium local switching rate of $.0324 per minute. *Id.* at 10. That was only $.00307 per minute less than the rate proposed by Beehive.

Using its average TOE to TPIS ratio to derive Beehive's revenue requirement, and by using a DEMs-based total demand figure, the Bureau developed a premium local switching rate of $.009443. *Beehive Telephone Co., Inc.*, FCC 98-1, at 10 (Jan. 6, 1998) ("*Refund Order*"). Thus, the Bureau's rate was 70.9% lower than the rate AT&T determined. The resulting rate prescription produced a 76.5% reduction in Beehive's premium local switching rate and a 52% reduction (from $.05893 to $.028253) in its per minute premium access charge for one mile of transport. Such a drastic reduction is not within the "zone of reasonableness". *Id.* at 10.

VII

AT&T correctly points out that Beehive should have stated that

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7/ *See* Reply to Petition to Suspend and Investigate and for Rejection at 3 (Aug. 4, 1997).

its costs to lease switch equipment dropped from $398,037 in 1995 to $336,000 in 1996. *See* Opposition at 12. 8/ However, that error does not make Beehive's supplemental information "inaccurate and unsupported". *Id.* at 11. Beehive has supplied the Commission with reams of accurate cost support. *See supra* note 6.

AT&T contends that Beehive did not show that its leased switch costs were "reasonable". Opposition at 12. Beehive believes that it did. *See* Petition at 17, Ex. 6. Certainly, Beehive's leased costs are reasonable compared to the stand-alone switch cost of $560,000 that is employed by the AT&T-sponsored Hatfield Model. *See id.*, Ex. 6 at 4. Moreover, Beehive showed that its expenditures (1) were reasonably related to local switching service, because they increased the use of the service and decreased costs to customers; and (2) conferred benefits on its interexchange carrier customers, its local subscribers, and the remote communities it serves. *See id.* at 21. Beehive's expenditures, therefore, pass the "ratepayer benefit test". *See AT&T Communications*, 5 FCC Rcd 5693, 5694-5 (1990).

VIII

AT&T argues that section 69.113 of the Commission's Rules

8/ AT&T claims to find a discrepancy between Beehive's alleged representation that it had "600 miles of fiber and microwave" and its statement that it has "1,180 route miles of cable". Opposition at 10 n.12. There is no discrepancy. Beehive actually said it had "*over* 600 miles of fiber and microwave lines." Rebuttal to Opposition to Direct Case at 5-6 (emphasis added). Moreover, Beehive was referring to its toll facilities, and did not include its local plant distribution facilities. In any event, Beehive documented how it calculated its cable route miles. *See* Petition at Ex. 6.

requires that demand be "calculated by multiplying the number of non-premium interstate DEM minutes by 0.45, and adding this amount to the number of premium interstate DEMs." Opposition at 14. However, section 69.113 does not address how demand is calculated or mention "interstate DEMs". The rule provides that the "annual revenue requirement" is divided by the "sum of the *projected* access minutes for such period and a number that is computed by multiplying the *projected* non-premium minutes . . . by .45." 47 C.F.R. § 69.113(c). By its own terms, the rule is inapplicable to Beehive, which filed under section 61.39(b)(1)(ii) of the Rules.

Beehive was required to set access rates using its demand "for the total period since [its] last annual filing." 47 C.F.R. § 61.39(b)(1)(ii). Therefore, Beehive had to develop rates based on its actual 1995/96 demand, *see Designation Order* at 3, and could not make a "hybrid filing" using historical costs and projected demand, *see Small Telephone Companies*, 2 FCC Rcd at 3813. Hence, Beehive was precluded from using the section 69.113(c) methodology.

IX

Beehive does not "share" its access revenues with Joy Enterprises, Inc. ("JEI") as AT&T suggests. *See* Opposition at 13. Beehive's fixed monthly payments to JEI are not tied to access revenues. Moreover, the JEI arrangement does not affect Beehive's status as a common carrier. Beehive's "economic" interest in the destination of calls, *see id.*, is not relevant under the two-part test for common carriage, *see, e.g., Southwestern Bell Telephone Co.* v. *FCC*, 19 F.3d 1475, 1480 (D.C. Cir. 1994), or the statutory defi-

nition of "telecommunications carrier", *see* 47 U.S.C. § 153(44).

AT&T should not be heard to suggest that it does not make payments to information providers "to promote the delivery of calls to specific telephone numbers". Opposition at 13 n.20. AT&T pays an international information services provider for "traffic stimulation services". *See International Audiotext Network, Inc.* v. *AT&T Co.*, 893 F.Supp. 1207, 1216 n.8 (S.D.N.Y. 1994), *aff'd*, 62 F.3d 69 (2d Cir. 1995). AT&T pays the information provider a "commission" (calculated as a share of AT&T's revenues) for each international call it delivers to the provider. *See* 62 F.3d at 71.

AT&T also made payments to domestic chat-line providers. Attached hereto as Exhibit 2 is a copy of a March 1997 advertisement placed by a chat-line provider, which AT&T identified as Teleserve Communications, Inc. ("Teleserve"). *See* Verified Answer of AT&T's Corp., File No. E-97-14, at 14 (May 19, 1997). Because callers to the chat-line only paid AT&T's tariffed charges, Teleserve was compensated by AT&T under a so-called "Terminating Switched Access Arrangement" ("TSAA"). AT&T is currently defying a Bureau directive that it answer interrogatories going to its TSAAs with chat line providers. *See infra* Exhibit 3. The Commission should consider AT&T's conduct when it weighs the "overriding equitable considerations" that factor into any refund decision. *Virgin Islands*, 989 F.2d at 1240.

For all the foregoing reasons, the Commission is requested to reconsider and modify its *Refund Order* to prescribe for Beehive a premium local switching rate of $.032707 per minute and a non-

premium local switching rate of $.014734.

Respectfully submitted,

BEEHIVE TELEPHONE COMPANY, INC.
BEEHIVE TELEPHONE, INC. NEVADA

By _____
Russell D. Lukas

Their Attorney

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March 3, 1998

REVENUE REQUIREMENT	INTERSTATE	COMMON LINE	SWITCHING	INFORM	TRANSP. FAC.	TRANSP. TERM.	SPECIAL ACCESS	BILLING & COLLECTION	INTER-EXCHANGE
1. Net Investment	1,509,828	311,897	603,580		142,480	451,871			
2. Rate of Return	11.2500%	11.2500%	11.2500%		11.2500%	11.2500%			
3. Return (Line 1 x Line 2)	169,856	35,088	67,903		16,029	50,835			
4. Return less IDC	169,856	35,088	67,903		16,029	50,835			
5. Less Net Adds/Deducts for FIT	11,063	2,295	2,630		3,193	2,945			
6. Less ITC									
7. Total FIT Base (Line 4 - 5 - 6)	158,793	32,793	65,273		12,836	47,890			
8. FIT Gross-up Factor	51.5152%	51.5152%	51.5152%		51.5152%	51.5152%			
9. Gross FIT (Line 7 x Line 8)	81,803	16,893	33,626		6,612	24,671			
10. Less ITC									
11. Net FIT (Line 9 - Line 10)	81,803	16,893	33,626		6,612	24,671			
12. Total SIT Base (Line 7 + Line 9)	240,596	49,686	98,899		19,448	72,561			
13. SIT Rate	5.0000%	5.0000%	5.0000%		5.0000%	5.0000%			
14. Net SIT (Line 12 x Line 13)	12,030	2,484	4,945		972	3,628			
15. Return + FIT + SIT (Line 4+11+14)	263,688	54,466	106,473		23,614	79,134			
16. Total Exp's, Taxes less Misc. Rev's	2,402,197	268,350	775,360		1,016,351	278,565		63,571	
17. Total Rev. Req't. (Line 15 + 16)	2,665,885	322,816	881,833		1,039,965	357,699		63,571	

TARIFF

REVENUE REQUIREMENT	INTERSTATE	COMMON LINE	SWITCHING	INFORM	TRANSP. FAC.	TRANSP. TERM.	SPECIAL ACCESS	BILLING & COLLECTION	INTER-EXCHANGE
1. Net Investment	289,063	82,410	41,359		14,798	150,496			
2. Rate of Return	11.2500%	11.2500%	11.2500%		11.2500%	11.2500%			
3. Return (Line 1 x Line 2)	32,520	9,271	4,653		1,665	16,931			
4. Return less IDC	32,520	9,271	4,653		1,665	16,931			
5. Less Net Adds/Deducts for FIT									
6. Less ITC									
7. Total FIT Base (Line 4 - 5 - 6)	32,520	9,271	4,653		1,665	16,931			
8. FIT Gross-up Factor	31.3888%	31.3888%	31.3888%		31.3888%	31.3888%			
9. Gross FIT (Line 7 x Line 8)	10,208	2,910	1,461		523	5,314			
10. Less ITC									
11. Net FIT (Line 9 - Line 10)	10,208	2,910	1,461		523	5,314			
12. Total SIT Base (Line 7 + Line 9)	42,728	12,181	6,114		2,188	22,245			
13. SIT Rate									
14. Net SIT (Line 12 x Line 13)									
15. Return + FIT + SIT (Line 4+11+14)	42,728	12,181	6,114		2,188	22,245			
16. Total Exp's, Taxes less Misc. Rev's	121,359	18,495	23,729		35,163	32,403		11,569	
17. Total Rev. Req't. (Line 15 + 16)	164,087	30,676	29,843		37,351	54,648		11,569	

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

BEEHIVE TELEPHONE COMPANY, INC. and BEEHIVE TELEPHONE, INC. NEVADA,	)	
Complainants,	)	
v.	)	File No. E-97-14
AT&T Corp.,	)	
Defendants.	)	

AT&T'S SUPPLEMENTAL RESPONSE TO INTERROGATORIES

Pursuant to Section 1.729 of the Commission's Rules, 47 C.F.R. ¶ 1.729, and the Enforcement Division's letter ruling of February 10, 1998,[1] Defendant AT&T Corp. ("AT&T") submits these supplemental responses to the interrogatories of Complainants Beehive Telephone Company, Inc. and Beehive Telephone, Inc. Nevada (collectively "Beehive"), and states as follows:

INTERROGATORY NO. 1

For each and every TSAA or any other type of arrangement in which you pay or have paid an information provider for providing terminating access service, to which you currently are a party or formerly were a party and the arrangements have since been terminated state:

a) The name and address of the LEC which would have provided terminating access service absent the agreement;

b) the location of the terminating access point;

c) all rates, terms and conditions governing terminating access under the agreement;.

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[1] Letter to Counsel for AT&T and Beehive from Deena M. Shetler, File Nos. E-97-14, E-97-04 (Feb. 10. 1998).

d) all rates terms and conditions which would govern terminating access absent the agreement if terminating access service was supplied by the LEC;

e) the name and address of the information provider who is or was party to the agreement;

f) the type of information service provided by the information provider;

g) all rates, terms and conditions of the agreement between you and the information provider who is or was party to the agreement and;

h) the date of execution and duration of the agreement.

Response

The following response is confidential and provided pursuant to a protective order to be issued in this proceeding:

1(a), 1(c), 1(e), 1(h):

LEC	Information Provider (IP) and address of terminating premises	Rates paid to IP for access service	Dates

(4) Responsibilities of AT&T:

(5) Testing, Trouble Reporting:

(6) Restrictions:

(7) Regulatory approvals:

(8) Limitation of Liability:

(9) Termination:

(10) Non-exclusive Dealings; Other Contracts:

(11) Proprietary Information:

(12) Publicity:

(13) Assignment:

(14) Other Provider Locations:

(15) Additional Terms and Conditions:

INTERROGATORY NO. 2

Identify and state the date, author, recipient, type of document, subject matter and location where maintained of any contracts or other documents which pertain to any arrangement identified in response to interrogatory number 1 above.

RESPONSE TO INTERROGATORY NO. 2

With regard to each TSAA described in response to Interrogatory No.1, the date and subject matter of the TSAA arrangements are described in response to Interrogatory No.1. The recipient for each is the TSAA provider. The TSAA contractual terms were drafted by the AT&T Legal Department and the details regarding the parties, terminating premises and compensation rate were completed by the TSAA provider and an AT&T account representative. The TSAA agreements encompass all relevant information requested in Interrogatory Nos. 1(a), 1(c), 1(e), 1(g) and 1(h), and the TSAA contracts are maintained in an AT&T facility in Pleasanton, California.

INTERROGATORY NO. 4

State the date and the specific reasons you terminated your TSAA with Teleserve and state the reason for any delay in time between the date you notified Teleserve you would be terminating and the actual termination date.

OBJECTION TO INTERROGATORY NO. 4

AT&T provided the reason that it terminated the TSAA with Teleserve in its first response to this interrogatory. It states further that AT&T originally

notified Teleserve on April 30, 1996 in writing, via certified mail, return receipt requested, that it was exercising its right to terminate the TSAA. AT&T never received confirmation that the termination notice had been received by Teleserve and sent another notice on March 15, 1997. AT&T then terminated the TSAA on June 15, 1997.

INTERROGATORY NO. 6

In the event that it was not identified in response to interrogatory numbers 1 and 2 above, state the information requested in interrogatories number 1 and 2 above pertaining to your March 14, 1995 TSAA with Teleserve.

RESPONSE TO INTERROGATORY NO. 6

AT&T provided a full response to this interrogatory in response to Interrogatory Nos. 1 and 2 above.

Respectfully submitted,

AT&T CORP.

By _____

Mark C. Rosenblum
Peter H. Jacoby
Jodie Donovan-May

Its Attorneys

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(908) 221-4243

February 24, 1997

VERIFICATION

STATE OF CALIFORNIA)
) ss.:
COUNTY OF)

ROBERT WILKINSON, being first duly sworn, deposes and says that he is Project Manager, AT&T Corp., that he has read the foregoing Supplemental Response to Interrogatories, that he is fully familiar with the facts set forth therein, based on personal knowledge, or on a review of them with others who have personal knowledge, and that they are true and correct to the best of his knowledge, information and belief.

Robert Wilkinson
Robert Wilkinson

Sworn to and subscribed
to before me this the 23rd
day of February 1998

Marcell Samuels
Notary Public

MARCELL SAMUELS
COMMISSION 1103884
NOTARY PUBLIC - CALIFORNIA
ALAMEDA COUNTY
Commission Expires JUNE 30, 2000

1(c), 1(g):

(1) Contract period:

(2) Eligible traffic:

(3) Responsibilities of Provider: